In the

Supreme Court of the United States

October Term, 1979

No. 79-640

Bernard Goldberg, Reuben Mitchell, Joseph Shannon, Robert Christen, Victor Condello, Harrison J. Goldin, James Regan, individually and as Trustees of the Teachers' Retirement System of the City of New York and Isaiah Robinson, individually as former Trustee of Teachers' Retirement System,

Petitioners,

v.

Alfred Kirshner,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED

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Of Counsel:

Brown, Wood, Ivey, Mitchell & Petty

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MOTION OF MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") hereby respectfully moves pursuant to Rule 42 of this Court for leave to file the annexed brief in support of the Petition for a Writ of Certiorari. The consent of the Corporation Counsel of the City of New York on behalf of the Petitioners has been obtained. Consent of the Respondent has been requested and refused.

Merrill Lynch is the largest broker-dealer in the United States, and is actively involved in the municipal securities market. As such, Merrill Lynch has a substantial interest

in the nature and scope of liability that may be implied under the antifraud provisions of the federal securities laws with respect to transactions in municipal securities. In addition, Merrill Lynch is a defendant in a number of class actions pending in the United States District Court for the Southern District of New York, consolidated under the caption *In Re New York City Municipal Securities Litigation,* MDL Docket No. 314, M-21-22. Those actions, like this action, arise out of the New York City fiscal crisis, and, like this action, present questions as to the propriety of allowing an implied right of action under the antifraud provisions of the federal securities laws with respect to transactions in municipal securities. Merrill Lynch and certain other defendants have moved to dismiss those actions on the grounds that no such private right of action may be implied; Merrill Lynch is therefore acutely interested in having this Court resolve the related questions presented by the Petition.

Merrill Lynch strongly believes that the Second Circuit Court of Appeals erred below in assuming the existence of an implied right of action under Section 17(a) of the Securities Act of 1933 and under Section 10(b) of the Securities Exchange Act of 1934 with respect to transactions in municipal securities. The Second Circuit's ruling seriously conflicts with this Court's subsequent decisions in *Cannon* v. *University of Chicago,* 99 S. Ct. 1946 (May 14, 1979), and *Touche Ross & Co.* v. *Redington,* 99 S. Ct. 2479 (June 18, 1979). The language, structure, purpose and legislative history of both Acts, which are the relevant factors for implication of private remedies under *Cannon* and *Redington,* all plainly demonstrate that Congress intended no private civil actions under either Act to be available with respect to municipal securities. While the Petition addresses generally the question whether there can be an im-

plied right of action under Section 17(a), it does not focus upon the specific issue of the availability of such a private action with respect to transactions in municipal securities. Merrill Lynch believes, however, that this analysis is the most effective in resolving the important questions of liability presented by the Petition in a manner consistent with the intent of Congress in adopting the federal securities laws.

WHEREFORE, Merrill Lynch respectfully moves this Court that leave be granted to file the annexed brief *amicus curiae*.

Dated: November 2, 1979

Respectfully submitted,

/s/ JAMES B. MAY

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Preliminary Statement

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") submits this brief as *amicus curiae*, in support of the Petition for a Writ of Certiorari, and urges this Court to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in *Kirshner v. United States,* 603 F.2d 234 (2d Cir. 1978), *rehearing and rehearing en banc denied,* 603 F.2d 234 (2d Cir. 1979).

Question Presented

Merrill Lynch as *amicus curiae* addresses only the third issue presented in the Petition for Certiorari. This question may be restated and narrowed as follows:

May a private right of action for damages be judicially implied under Section 17(a) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77q(a), with respect to transactions in municipal securities, despite Congress' clearly expressed intention to exempt municipal securities from all civil liability under the federal securities laws?

Interest Of Merrill Lynch As *Amicus Curiae*

Merrill Lynch is the largest broker-dealer in the United States. It is actively involved in the municipal securities market as a marketmaker, as a broker and dealer, and as an underwriter of a significant number and substantial principal amount of new issues of municipal securities each year. Merrill Lynch therefore has an ongoing interest in the nature and scope of liability arising from transactions in municipal securities that may be implied under the amorphous standards of the general antifraud provisions of the federal securities laws.

In addition, Merrill Lynch is a defendant in several class actions pending in the United States District Court for the Southern District of New York, which have been consolidated under the caption *In Re New York City Municipal Securities Litigation,* MDL Docket No. 314, M-21-22. These actions[1] were brought against various defendants, including

The City of New York, its former Mayor, its Comptroller, and sixteen underwriters of New York City securities. The complaints allege, *inter alia,* violations of the antifraud provisions of the federal securities laws in connection with the issuance and underwriting of New York City bonds and notes in 1974 and 1975. The civil actions were instituted following certain events known as the New York City fiscal crisis. These events included the collapse of the public market for City notes and bonds, legislative imposition of a moratorium on payment of City notes, and a sharp diminution in the trading value of City notes and bonds.[2]

[1] *Friedlander* v. *The City of New York,* 75 Civ. 3981; *Spector* v. *The City of New York,* 75 Civ. 5461; *Goldfarb* v. *The City of New York,* 75 Civ. 5581; *Weisberg* v. *The City of New York,* 75 Civ. 5582; *Manchester* v. *The City of New York,* 77 Civ. 990. The *Friedlander* and *Spector* actions have been certified as class actions. *Friedlander* v. *The City of New York,* 71 F.R.D. 546 (S.D. N.Y. 1976); *Spector* v. *The City of New York,* 71 F.R.D. 550 (S.D.N.Y. 1976). The other actions were consolidated with *Friedlander* and *Spector* for pretrial purposes in the United States District Court for the Southern District of New York before the Hon. Richard Owen, D.J., by the Judicial Panel on Multidistrict Litigation. 439 F. Supp. 267 (J.P.M.L. 1977). Several other individual actions, brought in Massachusetts and in California, have also been consolidated in New York with these class actions for pretrial purposes.

[2] As a consequence of the fiscal crisis, the City was unable to borrow in the public credit markets and, in 1975, Congress enacted the New York City Seasonal Financing Act of 1975, 31 U.S.C. § 1501 *et seq.* Pursuant to that Act, the City was able to meet its seasonal financing needs through direct loans from the federal government. In 1978, the New York City Loan Guarantee Act of 1978, 31 U.S.C. § 1521 *et seq.,* was enacted, pursuant to which the federal government agreed to guarantee repayment of notes and bonds to be issued by the City to New York City and New York State employee pension funds.

This legislation embodies a carefully formulated congressional program for the fiscal recovery of New York City. It is indeed ironic that, if the Second Circuit's ill-considered recognition of a private right of action under Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), in connection with transactions in City securities were permitted to stand, that legislative plan would be threatened, if not destroyed. If Kirshner were to prevail on his Section 17(a) or 10(b) claims, the City pension

On August 1, 1979, Merrill Lynch and certain other defendants filed a motion to dismiss those actions, upon the grounds that the court should not infer either from Section 17(a) of the Securities Act or from Section 10(b) of the Exchange Act a private right of action for damages in connection with the issuance and underwriting of municipal securities.[3] Since any decision by this Court upon the related question presented by the pending Petition could substantially affect the outcome of the motions in the *New York City Municipal Securities Litigation*, Merrill Lynch has a significant interest in the granting of the Petition.

Merrill Lynch believes that the Second Circuit erred in *Kirshner* in finding a private right of action implicit in Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act with respect to transactions in municipal securities. The legislative history of both Acts reveals that Congress never intended any such private remedy to be available, and, as to municipal securities, there is no history of judicial acceptance of such a private action that might outweigh this otherwise dispositive expression of congressional intent. Although Merrill Lynch has a continuing interest in Congress' efforts at regulation of the municipal securities industry and has supported proposed legislation to that end,[4] Merrill Lynch believes that such regulation is

funds might effectively be precluded from purchasing Municipal Assistance Corporation bonds. The funds' commitments to purchase $625 million of such bonds in the 1979-82 period are a key element in the City's current four year financing program.

[3] Argument was heard on this motion and similar motions by other defendants on September 28, 1979. No decision has been rendered by the court to date.

[4] *See, e.g., Municipal Securities Full Disclosure Act: Hearings on S.2969 and S.2574 Before the Subcomm. on Securities of the Comm. on Banking, Housing and Urban Development*, 94th Cong., 2d Sess. 136-38 (1976) (testimony of Wallace O. Sellers, Vice President of Merrill Lynch).

appropriately effected only in accordance with express statutory remedies provided by Congress, rather than through *ad hoc* judicial determinations as exemplified by the decision below.

Merrill Lynch respectfully urges this Court to grant the Petition for Certiorari in order to forestall the substantial and inappropriate expansion of judicially created remedies invited by the Second Circuit's decision. Although the Court of Appeals did not consider the specific issue of the availability of implied remedies with regard to transactions in *municipal* securities, neither the court nor the parties had the benefit of this Court's recent decisions in *Cannon* v. *University of Chicago*, 99 S. Ct. 1946 (May 14, 1979), and *Touche Ross & Co.* v. *Redington*, 99 S. Ct. 2479 (June 18, 1979) (also reported at [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,894). The Court of Appeals' decision cannot be squared with the standards set forth in *Cannon* and *Redington*; this Court should grant review to ensure that the frustration of congressional intent embodied in the decision below is not compounded through reliance by other courts upon that erroneous decision, coming as it does from a Circuit that has often been recognized as an influential voice in this area of the law.

ARGUMENT

Section 17(a) of the Securities Act Does Not Give Rise to An Implied Cause of Action for Damages in Connection With Transactions in Municipal Securities.

Although Merrill Lynch joins with the Petitioners in asserting that this Court should grant review in order to make clear that no civil action for damages may be implied under Section 17(a) of the Securities Act with regard to *any* type of security, Merrill Lynch respectfully urges that, at the very least, the unavailability of such a remedy in connection with transactions in municipal securities is manifest under the standards set forth by this Court in *Cannon* v. *University of Chicago,* 99 S. Ct. 1946 (May 14, 1979), and *Touche Ross & Co.* v. *Redington,* 99 S. Ct. 2479 (June 18, 1979). In *Cannon* and *Redington,* this Court substantially refined and clarified the test for implication of private remedies articulated in *Cort* v. *Ash,* 422 U.S. 66 (1975). Although this Court reaffirmed generally the propriety of the *Cort* test, *see Cannon* at 1953; *Redington* at 2489, the Court made clear that the "central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action," *Redington,* 99 S. Ct. at 2489, and that "[t]he question of the existence of a statutory cause of action is, of course, one of statutory construction." *Id.* at 2485.

Merrill Lynch respectfully submits that the following analysis of congressional intent is required by *Cannon* and *Redington*:

1. The "language and focus of the statute, its legislative history, and its purpose" must indicate that Congress intended a cause of action to be created. *Redington, supra* at 2489.

2. As regards the language of the statute, the critical factor is whether the language is "right-creating" or "duty-creating"; if the language falls in the latter category, the implication of a private remedy is inappropriate. *Cannon, supra* at 1954-55 & n.13; *Redington, supra* at 2489.

3. In analyzing the "focus" and "purpose" of the statute, the existence of express but circumscribed remedies militates against the implication of additional or more expansive remedies. *Redington, supra* at 2487-88.

4. The legislative history of the statute must affirmatively evince congressional intention or understanding that the remedies asserted would be inferred by the courts. *Cannon, supra* at 1956; *Redington, supra* at 2486-87.

Application of this analysis to Section 17(a) of the Securities Act compels the conclusion that no private remedy is available under that Section in connection with transactions in municipal securities. Section 17's "language and focus . . ., its legislative history and its purpose", *Redington,* 99 S. Ct. at 2489, reveal that the creation of a private remedy under that Section by the Second Circuit was wholly inappropriate and should be reversed by this Court.

With regard to the language of Section 17(a), that Section is clearly within the category of statutes that this Court characterized in *Cannon* as "duty-creating". *See Cannon,* 99 S. Ct. at 1954 n.13. In that Section, Congress has not "explicitly conferred a right directly on a class of persons". *Id.* The statutory language, like that of Section 10(b) of the Exchange Act, simply describes certain conduct as "unlawful". Under *Cannon,* therefore, it cannot serve as the basis for an implied cause of action.

Neither the focus nor the purpose of the Securities Act provides any support for implication of a private remedy under Section 17(a). The Securities Act regulates generally the issuance and underwriting of securities (as opposed to aftermarket trading) and, in that connection, provides certain specific and carefully circumscribed civil remedies. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 195 (1976). The express civil remedies of the Securities Act referred to in *Hochfelder* are those contained in Section 11 (liability for misstatements in a registration statement), Section 12(1) (liability for the sale of unregistered securities), Section 12(2) (liability for misstatements in a prospectus or for misleading oral statements) and Section 15 (responsibility of "controlling persons" for others made liable under Sections 11 and 12). These express remedies are carefully circumscribed, both with respect to the persons upon whom liability may be imposed and with respect to the circumstances giving rise to such liability; moreover, Congress imposed substantial procedural limitations upon the assertion of claims under each of these Sections. *See Hochfelder,* 425 U.S. at 208 n.26, 209 n.27.

Not only did the Securities Act specifically provide for carefully drawn express civil liabilities, it equally specifically excluded municipal securities from those provisions. Section 3(a) of the Securities Act, 15 U.S.C. § 77c(a), provides that except "as hereinafter expressly provided, the provisions of [the Securities Act] shall not apply to" the classes of securities specified in subsections (1) through (11). Subsection (2) of Section 3(a) specifically exempts

> any security issued or guaranteed by . . . any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories . . . .

This exemption applies both to the registration provisions of the Securities Act, Sections 5 through 8, and to its liability provisions, Sections 11 and 12.

It is true that the exemption afforded by Section 3(a)(2) does not extend to Section 17, subsection (c) of which states that "the exemptions provided in section 3 shall not apply to the provisions of this section." It would ignore the teaching of *Cannon* and *Redington,* however, to say that the general antifraud proscription of Section 17(a) can serve as the basis for an implied civil remedy with respect to municipal securities. Congress specifically excluded municipal securities from the express liability provisions of the Securities Act; its intent may not be thwarted by imposing that same liability by judicial implication. Congress, having carefully delineated the persons to whom and the circumstances under which the express liability provisions would apply, would be surprised to find that its efforts in this regard had been vitiated by virtue of an implied remedy lurking in Section 17(a). *See Hochfelder, supra* at 210-11.

The legislative history of the Securities Act reveals that the exemption afforded municipal securities was intended by Congress to insulate municipal securities from all federal civil actions for damages.

Congress was acutely aware of the constitutional limitations upon its authority to regulate state (or municipal) activities, including the issuance of securities.[5] For example, the House Report which accompanied H.R. 5480 (the original version of the Securities Act) commented

[5] It is unnecessary to decide whether Congress correctly perceived a constitutional impediment to federal regulation of municipal securities. The relevant inquiry is what Congress *thought* were the limitations upon its power to regulate. *Moor* v. *County of Alameda,* 411 U.S. 693, 709 (1973).

upon the Section 3(a)(2) exemption for municipal securities, as follows:

> The term "political subdivision" carries with it the exemption of such securities as county, town, or municipal obligations, as well as school district, drainage district, and levee district, and other similar bonds. The line drawn by the expression "political subdivision" corresponds generally with the line drawn by the courts as to what obligations of States, their units and instrumentalities created by them, are exempted from Federal taxation. By such a delineation, any *constitutional difficulties* that might arise with reference to the inclusion of State and municipal obligations are avoided.

H.R. Rep. No. 85, 73d Cong., 1st Sess. 14 (1933) (emphasis added). Congress' concern with constitutional limitations influenced the scope of the express civil liabilities it was willing to provide:

> Sections 11 and 12 create and define the civil liabilities imposed by the Act and the machinery for their enforcement which renders them practically valuable .... To impose a lesser responsibility would nullify the purposes of this legislation. To impose a greater responsibility, *apart from constitutional doubts,* would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public.

H.R. Rep. No. 85, *supra* at 9-10 (emphasis added).[6]

[6] Moreover, there was at that time a general belief that municipal securities were safer and, therefore, less in need of any form of regulation.

> Of course, we do not think that any security of the United States Government, for example, needs the surveillance of the Federal Trade Commission [then the proposed regulatory agency], or a security of a state government.

Federal Securities Act: Hearings Before the House Interstate and Foreign Commerce Comm. on H.R. 4314, 73d Cong., 1st Sess. 29 (1933) (testimony of Huston Thompson, an attorney and former member of the Federal Trade Commission, on the exemption provision of H.R. 4314). Even if this assumption has proved to be less than accurate in recent years, the relevant inquiry in analyzing the legislative history of Section 17 is what Congress thought in 1933, not what Congress might or ought to think now. *See Redington,* 99 S. Ct. at 2488 n.16; *cf.* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 534 (1947): "An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion."

There is abundant evidence in the legislative history of the Section 3(a)(2) exemption that Congress recognized it was exempting municipal securities from *all* federal civil liability. Initially, H.R. 5480 did not extend the 3(a)(2) exemption to Section 12 liability. In the original draft of that bill, submitted to the House on May 4, 1933, Section 12(2) included within its scope all securities, "whether or not exempted by Section 3". On May 10, 1933, H.R. 5480 was amended by the Senate to exclude from the scope of Section 12(2) civil liability various categories of securities, including municipal securities. The issue of the applicability of Section 12(2) to exempted securities was settled by the Conference Committee, and the Conference Report, issued on May 20, 1933, stated that securities "covered" by Section 3(a)(2) would be exempted from the provisions of Section 12(2). *See* H.R. Rep. No. 152, 73d Cong., 1st Sess. 27 (1933).[7] This history documents

[7] Significantly, Congress did not exclude all types of securities generally exempted by Section 3(a) from the operation of Section 12(2). In fact, Section 12(2) liability extends to *all* securities generally exempted by Section 3(a), except those enumerated specifically in Section 3(a) (2). This underscores Congress' particular concern with the imposition of *any* civil liability with respect to the types of securities, such as municipal securities, specified in Section 3(a)(2).

Congress' intent to exclude municipal securities from any civil liabilities under the Securities Act.[8]

There is no intimation whatsoever in the legislative history of Section 17(a) of the Securities Act that Congress intended this provision to extend civil liability to classes of securities that were exempted from the coverage of Sections 11 and 12, or that Congress anticipated that the courts would provide such an extension. Quite to the contrary, it is clear that Section 17(a) was intended to be the basis for injunctive and criminal actions only. S. 875, the initial Senate bill, included a general antifraud provision (Section 13) similar to that ultimately enacted as Section 17(a); according to the report of the Senate Committee on Banking and Currency, this provision was included so that "[t]he Government may stop the further or threatened fraud or misrepresentation by injunction in the district courts" and "[t]hose guilty of the fraud may be prosecuted criminally by the Attorney General." S. Rep. No. 47, 73d Cong., 1st Sess. 6 (1933).[9]

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[8] It is also significant that this conscious exclusion of municipal securities from the registration and civil liability provisions of the Securities Act was adopted despite testimony before Congress urging the elimination of the exemption. *See, e.g., Securities Act: Hearings Before the Senate Comm. on Banking and Currency on S.875,* 73d Cong., 1st Sess. 65-66 (testimony of A. H. Carter of the New York Society of Certified Public Accountants); *id.* at 232 (testimony of M. H. Maclean, Vice-President and Director of Harris Trust & Savings Bank).

[9] This view is reflected in a contemporaneous speech by James M. Landis, one of the authors of the Securities Act and, at that time, a member of the Federal Trade Commission:

> The suggestion has been made on occasion that civil liabilities arise also from a violation of Section 17, the first subsection of which makes unlawful the circulation of falsehoods and untruths in connection with the sale of a security in interstate commerce or through the mails. But a reading of this section in the light of the entire Act leaves no doubt but that violation of its provisions gives rise only to a liability to be

The conclusion that Congress intended to exempt municipal securities from all private civil actions under the Securities Act is supported by the abundant evidence of Congress' similar intent in formulating and adopting the Exchange Act only a year later. Although the Petition for Certiorari does not raise the question of the propriety of inferring a private remedy from Section 10(b) of the Exchange Act, it is nevertheless appropriate to consider the structure and legislative history of the Exchange Act because the two Acts and their legislative histories should be read *in pari materia. See Ernst & Ernst* v. *Hochfelder, supra,* 425 U.S. at 206:

> The 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities. . . . As the Court indicated in *SEC* v. *National Securities, Inc.,* 393 U.S. 453, 466 (1969), "the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen . . . ."

The structure of the Exchange Act, like that of the Securities Act, evidences Congress' conscious decision to exempt municipal securities from civil liabilities under the federal securities laws. The express remedies of the Exchange Act do not apply to securities exempted by Section 3(a)(12), which includes municipal securities. Section 9 of the Exchange Act, which provides an express remedy for purchasers and sellers victimized by price manipulations,

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> restrained by injunctive action or, if wilfully done, to a liability to be punished criminally.

Landis, *Liability Sections of Securities Act Authoritatively Discussed,* 18 Am. Acct. 330, 331 (1933). *See also SEC* v. *Texas Gulf Sulphur Corp.,* 401 F.2d 833, 867 (2d Cir. 1968) (en banc) (Friendly, J., concurring), *cert. denied,* 394 U.S. 976 (1969).

does not apply to securities exempted by Section 3(a)(12). 15 U.S.C. § 78i(f). Section 16 applies only to "equity" securities. 15 U.S.C. § 78p. Section 18 applies only to securities "registered" under the Act (which, at the time of its enactment, meant only securities listed on a national securities exchange). 15 U.S.C. § 78r. Furthermore, each express remedy in the Exchange Act is subject to "carefully drawn procedural restrictions . . . ." *Hochfelder*, 425 U.S. at 210.

The legislative history of the Exchange Act reveals that the Congress that had one year earlier declined to create any private actions with respect to municipal securities chose consciously to adhere to that determination in formulating the Exchange Act. Both the House and the Senate considered several bills that failed to exempt municipal securities from the civil remedy provisions, but this provoked much testimony as to the importance of preserving such an exemption. *See, e.g., Stock Exchange Practices: Hearings Before the Senate Banking and Currency Comm. on S. Res. 84, S. Res. 56 and S. Res. 97*, 73d Cong., 1st Sess. 6839-40, 7069, 7276, 7413-14 (1934); *Stock Exchange Regulation: Hearings Before the Comm. on Interstate and Foreign Commerce of the House of Representatives on H.R. 7852 and H.R. 8720*, 73d Cong., 1st Sess. 298-300 (1934). In addition, Congress was asked to consider legislation that would have invested the Securities and Exchange Commission with discretionary authority to exempt municipal securities from the operation of the Act. *See Senate Hearings, supra* at 7476-78. Congress chose, however, to reject the various proposed bills that failed to provide an exemption from private actions for municipal securities; in so doing, Congress unambiguously evidenced its intention to insulate municipal securities from all private civil actions under the federal securities laws.

The foregoing discussion demonstrates that Congress unequivocally intended to exempt municipal securities from the civil remedy provisions of the federal securities laws. To hold, nonetheless, that Section 17(a) can provide a basis for a private right of action through judicial implication would ignore Congress' concern for the dictates of federalism and would violate the standards set forth by this Court in *Cannon* v. *University of Chicago* and *Touche Ross & Co.* v. *Redington.* Merrill Lynch respectfully urges this Court to grant the Petition and thereby avail itself of this opportunity to instruct the lower courts as to the unavailability of a private action under Section 17(a), before the unquestioning acceptance of that remedy by those courts becomes too well established to permit of reexamination.

Conclusion

For the foregoing reasons, a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: November 2, 1979

Respectfully submitted,

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